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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1955.

No. 609

IN THE MATTER OF V-I-D, INC.,

Debtor.

KELLEY, GLOVER & VALE, INC., Trustee,

Appellant-Petitioner,

VS.

Mc M. COFFING, Trustee,
PETER L. EVANS, Successor Indenture-Trustee,

CHARLES J. KRAMER and
HELEN E. KRAMER, Indenture Bondholders,

Appellees-Respondents.

Petition for Writ of Certiorari

to the United States Court of Appeals for the Seventh Circuit.

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May it Please the Court:

Opinions Below.

The Court of Appeals' opinion is reported in:
In re V-I-D, Inc. (7 Cir.) 226 F. 2d 113

It is also printed in the Appendix hereof at page 19.

The District Court's opinion (R. 110-112) is not published so far as we know.

Grounds on Which this Court's Jurisdiction is Invoked.

The Court of Appeals' opinion and judgment was entered on October 7, 1955, dismissing this Petitioner's appeal on the ground that it "had *no appealable interest*" and was not "adversely affected" by the order appealed from. (Appendix, p. 19).

Jurisdiction here is invoked under 28 U.S.C. 1254 and 2101.

Petitioner also invokes "an exercise of this Court's power of supervision" under Rule 19(b), to vindicate his right of appeal and to obtain a hearing on the merits thereof in the Court of Appeals, not to review the merits here.

Questions Presented for Review.

Petitioner claims that he has an "*appealable interest*" and that the Court of Appeals' opinion and judgment dismissing his appeal for alleged lack thereof is an erroneous *denial* of his *right to appeal.*

Hence, this Court is not required now to consider any of the questions of law or fact going to the merits of the case, raised by Petitioner in the Court of Appeals, except so far as necessary to see that he was entitled to a *hearing* on the merits in the Court of Appeals.

We think the appropriate disposal of this Petition, if relief is to be granted, would be as in the following case where this Court of Appeals dismissed an appeal for failure of timely filing under Rule 73(a). This Court reversed in a short memorandum reciting the petition for certiorari was granted (without further briefing or argument), judgment dismissing the appeal was vacated, and cause remanded to

the Court of Appeals to *determine* whether the application of Rule 73(a) to *this particular* action "would work an injustice".

Mitchell v. *White Consolidated, Inc.*, 336 U.S. 958

On review on the merits, the Court of Appeals affirmed, ruling against the appellant on the merits. (177 F. 2d 500). Appellant's petition for certiorari to review the latter judgment was denied:

White v. *White Consolidated, Inc.*, 339 U.S. 913

Thus, certiorari was granted peremptorily to protect the appellant's *right to appeal*, regardless of the fact as to whether he was entitled to *prevail* on the merits.

Statement of the Case.

This comes up from an *original*, voluntary corporate reorganization proceeding filed under Chapter 10, *Section* 128 (11 U.S.C. 528) of the Bankruptcy Act in the District Court. (N.D. Ind.)

The Court's trustee filed his proposed Amended Plan of Reorganization on November 30, 1953. In effect, it took all the debtors property and handed it over to the Class 1 creditors. (R. 77-99).

This Petitioner, the sole class 2 creditor, filed its Objections to this Amended Plan on January 5, 1954. (R. 100-107). These were overruled (R. 110) and the Amended Plan was confirmed (R. 148), from both of which orders Petitioner appealed. (R. 112, 154).

Petitioner's Objections were *not* on the usual ground that the Amended Plan failed to give the junior creditor a large enough share of the fruits of the reorganization. It attacked the Amended Plan as illegal or improper on basic grounds. Petitioner urged the District Court to refuse

approval and confirmation of the trustee's Amended Plan, and to *dismiss* the reorganization proceeding pursuant to *Section* 236(2) (11 U.S.C. 636(2)). This would automatically "reinstate" the prior mortgage foreclosure proceeding in the state court by virtue of *Section* 259 (11 U.S.C. 659).

To understand the question, and avoid the fallacies below, it is necessary to observe the simple and *unique character* of this debtor corporation's *property* and *"creditors,"* as admitted and found by the District Court:

(a) The debtor's sole property was one piece of Indiana real estate. (R. 150).

(b) It owed *no debts* of its *own.* It had simply taken a conveyance of this real estate for a nominal consideration, *subject* to the "first" (Class 1) mortgage and the "second" (Class 2) mortgage here involved. The debtor did *not assume* either mortgage. These were liens against the debtor's *property* but not personal debts which it incurred, assumed or owed.

(c) These two lien holders, Class 1 and Class 2 are the *only* "creditors" involved in this reorganization proceeding. (R. 149).

(d) A *"prior"* Indiana *state foreclosure action was pending* on this same real estate (R. 103) but was "ordered *stayed"* or held in *suspense* by virtue of the filing of this reorganization proceeding. (R. 6, 10, 106). *Section* 256 (11 U.S.C. 656).

(e) The Act requires that upon failure to consummate a Plan, the result *must* be to adjudge the debtor bankrupt and proceed in bankruptcy, *or* to *dismiss* the proceeding and let the state court foreclosure proceed. (*Section* 236(2) (11 U.S.C. 636(2)). The notice of hearing on this Amended Plan so recited. (R. 142-143).

(f) The Amended Plan admittedly gives the "first" mortgage (Class 1) bondholders the entire real estate and its accumulated rents (R. 78, 88), and the District Court's order confirming this Plan so recites. (R. 149-150).

But if the District Court had for any reason *withheld* the *judicial* approval or confirmation which it gave the Amended Plan (R. 110, 148), the probable result would have been *dismissal* of the reorganization proceeding. Thereby, the prior foreclosure proceeding in the state court would "become reinstated" by operation of *Section* 259 (11 U.S.C. 659), *supra.*

This "reinstatement" would result in a complete change in the relative rights of the Class 1 and Class 2 lienholders. The Class 1 lien would be denied enforcement in the state court by virtue of an Indiana Statute as construed by the Indiana courts. This would make the Petitioner's so called "second" (Class 2) lien a first lien, worth nearly 100 cents on the dollar, since its admitted amount of about $39,000 plus interest (R. 49, 159, par. 6) would approximately equal the $50,000 value of this real estate plus the $30,000 of cash accumulated rents thereof. (R. 150, par. 8).

By contrast, the Amended Plan gives all this real estate and money to Class 1, and adjudges the Class 2 lien *"is of no value"*. (R. 150, par. 9).

(g) This conflict of result in the bankruptcy versus state court forum comes from the doctrine (no longer contested by us) that *"in the allowance of claims* a bankruptcy court is not required to follow state statutes," as held by this Court of Appeals in the last preceding appeal in which this Class 2 Petitioner contested the propriety of giving preference to Class 1 *in the allowance of claims* in this proceeding:

In re V-I-D, Inc. (7 Cir.) 198 F. 2d 392 394-395

But this "allowance" was only *provisional* for the purpose of *distribution* in the bankruptcy court in the event the proceeding be *consummated* by subsequent approval and confirmation of a lawful and proper Plan. If the latter fails, the provisional "allowance" and "priority" of these liens in the bankruptcy court vanishes upon dismissal. The relative lien *rights* and the *remedies* of the two lien holders then come back under the state court and *state law. Section* 259 (11 U.S.C. 659).

(h) It is not necessary for this Court at this stage to determine the final merits of Petitioner's above contention that the Indiana law applicable in an Indiana court will give its Class 2 lien the entire property and money, worth $80,000.

It suffices for Petitioner to show a good faith belief and assertion of this right, having some reasonable basis,—not a sham assertion. If Petitioner's asserted right meets that test, it has a right to obtain review of it by appeal.

That petitioner's asserted right is probably correct in law, and at least not sham, appears on the face the Court of Appeals' previous opinion above cited, In re V-I-D, Inc. (7 Cir.) 198 F. F. 2d 392. The opinion *admits facts* as found by the District Court,—that the Class 1 mortgagee "*never* qualified to do business in Indiana", yet it *was* "doing business in Indiana within the meaning of the Indiana statutes" in the very act of negotiating this loan and creating this Class 1 lien. (198 F. 2d. at page 394, 1st column). This seems to come within the terms of the Indiana statutes and decisions recited in the opinion, (page 394). Then the opinion, after a confused struggle with the meaning and operations of the Indiana law (pages 394-395), *declines to decide it* and holds the Indiana law, *if adverse* to the Class 1 lien, is *inapplicable in* the bankruptcy court. (page 395, first column).

Petitioner's assertion as to the meaning and effect of Indiana law as making the Class 1 lien unenforcible *if* the prior state court foreclosure (R. 103-107) becomes "reinstated" is also strongly supported by other Indiana cases such as:

Burroughs v. Southern Colonization Co. (1933) 96 Ind. App. 93, 103-104, 106, 173 N.E. 716, and Barnett v. Central Republic Bank and Trust Co. (1935) 100 Ind. App. 495, 500, 196 N.E. 369,

These cases are *later* and more closely in point than most of those cited in the above Court of Appeals' opinion (198 F. 2d at page 395, top), though the ones there cited are not against Petitioner's contention.

Points of Attack on the Amended Plan.

Petitioner urged the following attacks upon the proposed Amended Plan in its Objections urging the District Court not to approve this Plan (R. 100-102) and not to confirm it. (R. 148, 150, par. 10). The same points were also urged upon the Court of Appeals in appellant's statement of Points on appeal. (R. 118):

(1)

This Amended Plan, on its face, is a perversion of the Chapter 10 machinery into a device for favoring one of two liens by using the bankruptcy court as a forum for the favored lienholder to evade the state law and the state court where its competitor would prevail, or in good faith asserts he would prevail.

The bankruptcy court's jurisdiction over the proceeding was originally invoked by the debtor's petition for reorganization which presented a quite different picture of numerous *additional* liens for taxes and the like against this prop-

erty (R. 7) and with the debtor saying it desired and expected to *reorganize itself* as a corporation. (R. 9) Subsequent years of operating the real estate by the trustee (R. 24-39) have reduced the liens to the present two contestants. (R. 149). The debtor subsequently abandoned its professed hope of reorganization. (R. 48).

The present *changed* fact situation, which must determine the propriety of a Plan, is not appropriate to the Amended Plan; no other has been offered or is likely to be. The District Court should have refused to approve or confirm the Amended Plan under *Section* 174 or 221 (11 U.S.C. 574 or 621), and should then have called a hearing under *Section* 236(2) (11 U.S.C. 636(2)) to determine whether to adjudge the debtor bankrupt and proceed in bankruptcy, or to dismiss the proceeding.

The present fact situation (no debts *owed by* the debtor, and its sole property having only two lien holders contesting each other's validily and priority) would probably make bankruptcy an improvident and improper procedure, requiring dismissal. But it is presently unnecessary to determine that future alternative which will arise only after the Amended Plan is rejected.

(2)

It appears on the face of the record that this Amended Plan was prepared by the trustee's counsel, Messrs. Draper and Draper, (R. 24, 45), who were disqualified from so doing by the fact that since 1941 they have been counsel for a Class 1 claimant (Barttlett and his heirs) on $2500 of Class 1 bonds, though this adverse representation by trustee's counsel was not disclosed to the court until April 9, 1953. (R. 59, 101). This long representation of a Class 1 claimant normally would give the attorney "an interest

naturally adverse to the interests" of the Class 2 lien creditor and in favor of Class 1.

This made the trustee's counsel an "interested" person within the disqualification of *Sections* 157 and 158(4) (11 U.S.C. 557 and 558(4)).

It normally would render the trustee's counsel unable or less able to perform the important initial statutory duty under *Section* 169 (11 U.S.C. 569) that "the trustee shall prepare and file a plan, or a report of *his reasons* why a plan *cannot* be effected." Both the court and the Petitioner as the Class 2 creditor, were entitled to have the trustee's counsel as well as the trustee be entirely disinterested, particularly as between these two conflicting Classes. It appears probable that a disinterested trustee's counsel would not have drafted this abortive Amended Plan in sole aid of Class 1 and would not have so consistently urged it upon the Court, but would have reported that a Plan "cannot be effected" under the existing situation.

(3)

If the Amended Plan be not invalid in its entirety as above urged in (1) and (2) it should at least be ordered amended *to cure its plain violation of Section* 205 (11 U.S.C. 605), under which this Petitioner would be entitled to receive (through the debtor) approximately $25,000 face amount of "unclaimed" Class 1 bondholder trust certificates at the end of the statutory five year period.

The Amended Plan first complies with *Section* 204 by creating trust certificates in the same total face amount and denominations as the Class 1 bonds. (R. 88). So if all bondholders should surrender their bonds in exchange for trust certificates, each would get his pro-rata share of the property on which his bond is a lien.

But the record shows an unusually large number of "unknown bondholders" exist in this issue,—about $25,000 of the $135,000 bond issue or 20% of the ownership of the property,—and the record shows clearly that most of these will remain unknown and their trust certificates will remain "unclaimed" at the end of the statutory five year period.

Section 204, par. 2 (11 U.S.C.A. 604, par. 2) expressly contemplates that these Class 1 bondholders shall "present or surrender their securities" and *each one receive the exact equivalent coming to him* within the specified time. "*After* such time no such claim or stock shall *participate* in the distribution under the plan."

Section 205 (11 U.S.C.A. 605) expressly provides that: "The securities or cash *remaining unclaimed* at the expiration of the time fixed * * * *shall* become the *property* of the *debtor* or of the new corporation." Since no new corporation is contemplated, *title* to these unclaimed shares in the property must *vest* in the debtor at the end of the five-year period *by the express terms of this section.* But under equity principles, *Petitioner's Class 2 lien would attach to any proceeds of this property* not taken by Class 1 and *which reverts to the debtor.* (R. 49, 150, par. 6).

But instead of turning these "unclaimed" certificates over to the debtor as required by *Section* 205 (11 U.S.C. 605), the Amended Plan divides these "unclaimed" certificates up pro-rata among the known bondholders who have already got their full share of the property, thus making a secondary "windfall" distribution, *wrongfully converting* to their own use the securities which *Section* 205 declares "*shall* become the *property* of the debtor" at the end of the five year period.

Section 205 dealing with *individual* "unclaimed" shares five years after a Plan is consummated, should not be confused (as the opinion does by inference in its final paragraph) with the doctrine that in the *initial* overall *formation* of the Plan, a class of creditors having prior claims or liens on assets cannot be compelled to take a smaller share so that juniors can get more.

Section 204 gives each security holder his full share at the outset of distribution. He is not prejudiced by the fact that some unknown bondholder may let his "unclaimed" share go to the debtor by operation of *Section* 205, five years later.

ARGUMENT.

We believe that a clear grasp of the rights Petitioner is trying to protect below, will suffice to show that it has an "appealable interest". This is mainly covered under the preceding headings.

Bad Temper of the Opinion Below.

As bearing on the kind of review the Petitioner received, it seems fair to point out that the Court of Appeals opinion exhibits a hostile attitude toward the former appellant, Mrs. Glover, and the present appellant, criticizing them by innuendo rather than direct statements.

At the middle of its second paragraph, the opinion says that Mrs. Glover and the present appellant have "resorted to" protracted litigation which has "stymied" the reorganization proceeding. Appendix, p. 20, 226 F. 2d at p. 114, 1st column.

A reading of those three prior opinions, the first two of which have no bearing here, will show that they presented serious and novel questions with care and with complete courtesy toward the Court of Appeals. In the second opinion (177 F. 2d 234,) the appellant, Mrs. Glover, was unjustly castigated as being "contumaceous" merely because, in a courteous brief and argument, she asked the Court of Appeals to review a question concerning the District Court's jurisdiction of the *subject matter* of this particular proceeding,—a subject which it is universally recognized a party has a right to raise at any stage and which

the Court of Appeals was under a continuing duty to notice at any stage.

Again, the opinion says in its fifth paragraph that: "The strategy of the appellant, however, appears to rest upon the hope that a reversal will result in a dismissal of the proceeding with the rights of the parties relegated to the State courts, where litigation can be renewed and perhaps continued for nother ten years."

Appendix, p. 21, 226 F. 2d at p. 114, 2nd column.

Certainly, appellant made no secret of its desire to have its rights in this Indiana real estate "relegated" to the Indiana courts where these parties were in a foreclosure case until it was suspended by this abortive proceeding.

What is wrong with challenging an apparently invalid and unlawful plan in this proceeding? What is wrong with seeking to invoke the benefit of *Sections* 236 (2) and 238 (11 U.S.C. 636 (2) and 638) which provide for such dismissals and "relegating" to the state court?

And what reason is there to infer in the last quoted part of the opinion that the Indiana courts will be any less competent in handling this litigation about this Indiana real estate than the courts below have been?

Questions Presented by Appellant Ignored in Court of Appeals' Opinion.

As already pointed out in this Petition at pages 7-10, supra, the Petitioner urged the District Court to disapprove the Amended Plan, as a step toward dismissal of the pro-

ceeding and "reinstatement" in the state court on the grounds:

(1) This Amended Plan is a perversion of Chapter 10.

(2) Trustee's counsel, who drafted this Plan and urged it upon the District Court and Court of Appeals, were not "disinterested" attorneys, particularly regarding this Plan, because it came to light in the record in 1953 that they had been counsel for a $2,500 Class 1 bondholder claimant in this proceeding since 1941. Hence, the Plan issued from a source partisan to Class 1, contrary to *Sections* 157 and 158 (4) (11 U.S.C. 557 and 558 (4)).

(3) If not totally invalid by virtue of (1) and (2), the Amended Plan should be ordered amended to cure its violation of *Section* 205 (11 U.S.C. 605) wherein the known Class 1 bondholders will takes an estimated $25,000 of "unclaimed" Class 1 certificates which would go to the debtor after five years, and then would become subject to Petitioner's lieu, under *Section* 205, and unlawfully proposes to *convert* these certificates to the use of the known Class 1 members.

Without attempting to argue or pass upon the final merits of whether the above contentions are well taken, each of them shows an attempt by the Petitioner to *preserve his lien rights in this property as against destruction thereof by the Amended Plan,*—hence he has an "appealable interest" even under the test alleged in the opinion,—"when his property rights *may* be diminished, his burdens increased or his *rights detrementally affected*". (Appendix, p. 22fi 226 F. 2d at 115)

All of the above assertions of "appealable interest" (1), (2) and (3) were put before the Court of Appeals twice in the printed record, first, in our Objections to the Amended Plan in the District Court (R. 100-102), second, in our statement of Points on Appeal, (R. 118-119), and a third time in our Appellant's Brief.

Yet the Court of Appeals' opinion totally ignores all the above points which would show an "appealable interest."

Fallacies in the Court of Appeals' Opinion.

While ignoring all the real points presented, the opinion sets up its own false issues, and discusses them.

As already mentioned, it blames the appellant for the long litigation. It pays no attention to the fact that this results from its own previous sanction of this abortive proceeding, and that people who find their property tied up in it are obliged to litigate at length in defense of their rights.

It dwells at length on the proposition that the bankruptcy court has found the debtor to be insolent, because its assets are "less than the amount of its bonded indebtedness," that the bankruptcy court found the debtor to be "insolvent," and found and adjudged that the Class 2 claim is of "no value."

But "insolvency" in itself is no justification for approving the Amended Plan.

Moreover, this "bonded indebtedness" and "insolvency" *will disappear* if this appeal succeeds in defeating this abortive and illegal Amended Plan, causing the bankruptcy court to release its grip on the property and letting it revert

to the state court. There, this large "bonded indebtedness" would disappear, and the debtor's assets would suffice to pay the Class 2 Claim in full.

This present "insolvency" and "no value" in the Class 2 lien are only *provisional* findings and orders contingent upon consumation of the Plan. If the Plan fails for any reason, these "findings" and adjudications fall with it. This is not changed by the fact repeated in the opinion that "no appeal was taken" from these orders determing insolvency etc. All these "unappealed" *administrative* orders, made as a basis for expected distribution of assets *in* the proceeding, die on the vine when the proceeding is dismissed.

This simply epmhasizes the fact that this Class2 lieu holder a legitimate "appealable interest" in trying to extricate his property from the bankruptcy court, the first step of which is to defeat this illegitimate Amended Plan.

Finally, as a reason for dismissal, the opinion makes the missleading statement that none of the findings (insolvency, no value claims, etc.) *is attacked* by appellant on the instant appeals.

These findings were not attacked as computations of figures, but were and are attacked on *basic grounds,* (R. 118) which if successful would destroy them in toto, causing dismissal of the proceeding and reinstatement of the state court foreclosure. (R. 118, 156)

Again, the opinion says "it is conceeded by appellant that the proceeding was properly instituted and that the court had jurisdiction."

But this simply means the bankruptcy court had jurisdiction over the *proceeding.* That was conceeded a long time ago. But it has nothing to do with the propriety of a Plan.

"The essential attack" which we make on the orders appealed from is not primarily that "the first class credi-

tors take everything," as the opinion says in its closing paragraph. The attack is *not* that we want a bigger share of the assets in this proceeding. We want to free our property from this illigitimate proceeding.

Again referring to the closing fallacy (of many) in the opinion,—the future possibility of adjudication in bankruptcy instead of dissmissal is no ground for saying that the Class 2 creditor does not have a present interest in defeating this Plan and attempting to get its property released from the bankruptcy court to the state court.

Certainty of future success is not a requisite for having a present "appealable interest."

The basic fallacy in the Court of Appeal's opinion is that it looks only to the "no value" which the bankruptcy court assigns to Petitioner's Class 2 lien.

But the Indiana courts would assign a large value, about $80,000, to Petitioner's Class 2 lien. (Page 5, supra).

Petitioner's objection to the Amended Plan in the District Court, and its appeal to the Court of Appeals, seek to attain this latter right by having the Amended Plan disapproved, which is a first and major step in returning the forum of lien enforcement to the Indiana courts. Hence, from Petitioner's standpoint, the right sought to be protected and attained by this appeal is not the "no value" assigned to it in the bankruptcy court but the $80,000 value which it would attain in the Indiana court if the appeal be successful.

Therefore, it is respectfully submitted that certiorari should be granted and the Court of Appeals be ordered to entertain and decide this appeal on the merits.

Respectfully submitted,

JAY E. DARLINGTON,
Attorney for Appellant-
Petitioner.

In the United States Court of Appeals For the Seventh Circuit

OCTOBER TERM, 1954, APRIL SESSION, 1955.

Nos. 11194 and 11265.

IN THE MATTER OF V-I-D, INC., Debtor.

KELLEY, GLOVER & VALE, INC., Trustee, *Appellant,*

vs.

M. McCOFFING, Trustee, *et al.*, *Appellees.*

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.

October 7, 1955.

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

MAJOR, *Circuit Judge.* These appeals are from orders entered in a proceeding for the reorganization of the debtor corporation under Chapter X of the Bankruptcy Act. No. 11194 is from an order of February 1, 1954, overruling appellants objections to approval of an amended plan, and No. 11265 is from an order of June 30, 1954, confirming the amended plan. Both appeals raise the same questions and they have been consolidated in this court.

The proceeding was commenced on June 24, 1939, by the voluntary petition of the debtor corporation. On August 28, 1939, an order was entered in which it was recited that the court was satisfied that the petition complied with Chapter X of the Bankruptcy Act and had been filed in good faith, and approved the same as properly filed. A trustee was duly appointed and, on October 11, 1939, qualified as such. On December 1, 1939, Marguerite S. Glover filed her intervention or reclamation petition claiming ownership to the real estate of the debtor, the same being its only asset, and praying for possession thereof and for a decree quieting her title therein. Since that time the reorganization proceeding has been stymied by the protracted litigation resorted to by Glover and her alter ego, Kelley, Glover & Vale, Inc., as trustee (objector and appellant in the instant case), as is evidenced by the fact that there have been three previous appeals to this court. *In re V-I-D, Inc., Debtor,* 158 F. 2d 964; *In re V-I-D, Inc.,* 177 F. 2d 234 and *In re V-I-D, Inc.,* 198 F. 2d 392. In the first two cited cases Glover was the appellant, and in the last, as in the instant appeal, Kelley, Glover & Vale, Inc. was the appellant.

Without any attempt to review our previous decisions or the facts recited therein, we think it can be safely said that the essential controversy during this prolonged litigation was whether the bonded indebtedness of the corporation constituted a lien prior to a mortgage indebtedness secured by a mortgage on the real estate. See *In re V-I-D, Inc.,* 198 F. 2d 392, 394. The debtor had no assets other than its real estate and it has long ago been decided that its value was far less than the amount of its bonded indebtedness. As was stated in the case last cited, "The

parties agree that the real estate here involved is not of sufficient value to satisfy either of these claims."

On April 9, 1953, the court entered an order classifying the creditors into two classes: Class 1, holders and owners of bonds secured by trust indenture, dated December 30, 1927, and Class 2, the beneficial owner and holder of judgment of foreclosure in favor of Kelley, Glover & Vale, Inc. On the same date, the court entered an order in which it was found, "That the fair value of the assets of this debtor is less than the aggregate debts under Classes 1 and 2, as specified in the order classifying creditors entered this date, and * * That V-I-D, Inc. is insolvent." Again, on August 5, 1953, the court found that the aggregate value of all property in the hands of the trustee was $76,307.63. No appeal was taken from any of these orders and they are not now subject to review. The Court, in its order of June 30, 1954 (one of the orders appealed from), found that Class 1 claims had been allowed in the amount of $373,638.75, reiterated its previous finding as to the total value of the debtor's assets and found that the Class 2 claim "is of no value."

On September 11, 1953, an amended plan of reorganization was submitted by the court appointed trustee. It is this plan which is now under attack, for reasons which we find difficult to comprehend. The strategy of the appellant, however, appears to rest upon the hope that a reversal will result in a dismissal of the proceeding with the rights of the parties relegated to the State courts, where litigation can be renewed and perhaps continued for another ten years.

Previously, this court denied a motion by appellees to dismiss the appeals on the ground that appellant had no

interest in the subject matter and, therefore, this court was without jurisdiction. The motion to dismiss has been renewed on this hearing. We have reached the conclusion that we previously erred in denying the motion to dismiss and that the motion must now be granted. As already noted, there has been an adjudication that the debtor was and is insolvent, that the value of its assets is far less than the amount of the claims of the first class creditors (the bondholders), and that the claim of the second class creditors (the appellant here) is of no value. None of these findings is attacked by appellant on the instant appeals. More than that, it is conceded by appellant that the proceeding was properly instituted and that the court had jurisdiction.

This court, *In re Michigan-Ohio Bldg. Corporation,* 117 F. 2d 191, dismissed an appeal on our own motion because the appellants had no appealable interest. While that was a proceeding under Section 77 (b) of the Bankruptcy Act, we think that the reasoning is pertinent here. We said (page 193): "Speaking more specifically, a party has an appealable interest only when his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed." It has also been recognized that in a Chapter X proceeding a creditor must be adversely affected as a prerequisite to a right to appeal. *In re Keystone Realty Holding Co.,* 117 F. 2d 1003, 1005. In *In the Matter of 620 Church Street Building Corp. et al.,* 299 U. S. 24, the court considered the action of the Court of Appeals in denying leave to appeal from an order confirming a plan of reorganization under Section 77 (b). In discussing the issue the court made a statement which we think pertinent here (page 27): "Petitioners insist that their consent to the plan of reorgani-

zation was necessary or that their claims should have been accorded 'adequate protection.' But the adequate protection to which the statute refers is 'for the realization of the value of the interests, claims or liens' affected. Here the controlling finding is not only that there was no equity in the property above the first mortgage but that petitioners' claims were appraised by the court as having 'no value.' There was no value to be protected."

The essential attack upon the order confirming the amended plan is that the first class creditors take everything and appellant, as a second class creditor, takes nothing. This, however, would be the inevitable result in any plan which might be proposed. At any rate, we know of no theory by which a creditor with a preferred lien can be compelled to share its rights with a creditor which is junior. Moreover, the court had the authority under Section 636 of Chapter X to adjudicate the debtor a bankrupt and proceed to liquidate the estate. See *Magidson* v. *Duggan et al.*, 212 F. 2d 748, 760. Again, if that event had occurred, no part of the proceeds could have been realized by appellant as a junior creditor, all of which merely fortifies our conclusion that appellant had no appealable interest.

The appeals are, therefore, dismissed.

(Caption)

No. 11194

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM THE ORDER OF THE COURT BELOW.

(Filed January 19, 1955)

Come now the Appellees and respectfully show unto the Court that they did heertofore, to-wit: On the 5th day of June, 1954, file herein their motion to dismiss these appeals and did file their brief in support thereof, and said Appellees do further show the Court that this Court did on the 18th day of June, 1954, enter an order to the effect that any ruling on said motion to dismiss said appeals should be continued pending the further order of this Court.

The Appellees now further respectfully show the Court that the printing of the present transcript of record, which was by the order of the Court deferred pending the filing of the second transcript of record and the docketing of the said second appeal, has now been completed and said second transcript has been filed and printed and the appellants' brief in support thereof has been duly filed in this court.

And the Appellees do now hereby renew their respective motions to dismiss this appeal, or in the alternative to affirm the orders of the Court below, and these Appellees do further pray that in the event of the overruling of these motions sixty (60) days be given and granted to these ap-

pellees from the date of ruling upon this motion within which to prepare and file their briefs on the merits.

Oral argument of these motions is hereby requested.

/s/ Alfred P. Draper
Counsel for Appellee, McM. Coffing, Trustee
504 Broadway
Gary, Indiana

/s/ Kenneth Call
Counsel for Appellee, V-I-D, Inc. Debtor Corporation
504 Broadway
Gary, Indiana

/s/ John W. Lyddick
Counsel for Appellee, Charles J. Kramer and Helen E. Kramer, Class 1 Creditors
504 Broadway
Gary, Indiana

(Caption)

No. 11265

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM THE ORDER OF THE COURT BELOW.

(Filed January 19, 1955)

Come now the Appellees and respectfully show unto the Court that they did heretofore, to-wit: On the 30th day of September, 1954, file herein their motion to dismiss this appeal, and did file their brief in support thereof, and said Appellees do further show the Court that this Court did on the 12th day of October, 1954, enter an order denying said motion to dismiss without prejudice to the right to renew said motion at the time of the oral argument of this appeal on the merits.

The Appellees now further respectfully show the Court that the printing of the transcript of record in Cause No. 11194, which was by the order of the Court deferred pending the finding of the transcript of record and the docketing of this appeal, has now been completed, and the present transcript of the record has been filed and printed and the appellant's brief in support thereof has been filed in this court.

And the Appellees do now hereby renew their respective motion to dismiss this appeal, or in the alternative to affirm the order of the Court below, and these Appellees do further pray that in the event of the overruling of this motion sixty (60) days be given and granted to these ap-

pellees from the date of ruling upon this motion within which to prepare and file their briefs on the merits.

Oral argument of these motions is hereby requested.

/s/ Alfred P. Draper
Counsel for Appellee, McM. Coffing, Trustee
504 Broadway, Gary, Indiana

/s/ Kenneth Call
Counsel for Appellee, V-I-D, Inc. Debtor Corporation
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/s/ John W. Lyddick
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UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Thursday, March 17, 1955

Before

Hon. J. Earl Major, Circuit Judge

In the Matter of V-I-D, Debtor, Kelley, Glover & Vale, Inc., Trustee, Appellant, **No. 11194** vs. M. McCoffing, Trustee, et al., etc., Appellees.	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

It is ordered that the motion of counsel for appellees to dismiss this appeal or, in the alternative, to affirm the order of the Court below, be, and the same is hereby, Denied. Appellees' request for oral argument on said motion is also denied.

It is further ordered that appellees be allowed sixty (60) days from this date for the purpose of filing their brief.

No. 11265. Order on same date and identical terms as above.

Office - Supreme Court, U. S.
FILED
JAN 31 1956
HAROLD B. WILLEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1955

No. 609

IN THE MATTER OF V-I-D, INC.,

KELLEY, GLOVER & VALE, INC., Trustee,
Appellant-Petitioner,

v.

McM. COFFING, Trustee,
PETER L. EVANS, Successor Indenture-Trustee,
CHARLES J. KRAMER and
HELEN E. KRAMER, Indenture Bondholders,
Appellees-Respondents.

BRIEF OF RESPONDENTS RESISTING CERTIORARI

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Attorney for Remaining Respondents.

Central Publishing Company, Indianapolis, Ind.

In the

Supreme Court of the United States

October Term, A. D. 1955

No. 609

IN THE MATTER OF V-I-D, INC.,

KELLEY, GLOVER & VALE, INC., Trustee,
Appellant-Petitioner,

v.

McM. COFFING, Trustee,
PETER L. EVANS, Successor Indenture-Trustee,
CHARLES J. KRAMER and
HELEN E. KRAMER, Indenture Bondholders,
Appellees-Respondents.

BRIEF OF RESPONDENTS RESISTING CERTIORARI

(A)

The Reports Below

Petitioner directs this Court's attention only to In re V-I-D, Inc., 226 F. (2) 113.

Three other appeals by the Glover group are also pertinent.

1. In re V–I–D, Inc., Debtor, 158 F. (2) 964.
2. In re V–I–D, Inc., 177 F. (2) 234.
3. In re V–I–D, Inc., 198 F. (2) 392, cert. den., 344 U. S. 914.

(B)

The Alleged Grounds on Which the Jurisdiction of this Court is Invoked

The certiorari petition on page 2 states that jurisdiction is invoked under 28 U. S. C. A. 1254 and 2101 and as "an exercise of this Court's power of supervision" under Rule 19(b). Those go only to the question of what may be appealed, not, as is here the problem of who may appeal.

(E)

Statement of the Case

Sixteen years ago, V–I–D, Inc. went into voluntary reorganization with court approval. (R. 6-16.)

Four appeals by the Glover group have ensued. When the trial court adjudged Glover did not own the corporation's property, she appealed. That judgment was affirmed.

In re V–I–D, Inc., debtor, 158 F. (2) 964.

Glover did not abide that judgment and later appealed on the same ground. Accordingly, the Court of Appeals struck that defiance commenting that such conduct was "contumacious."

In re V–I–D, Inc., 177 F. (2) 234.

Glover then shifted her attack. She abandoned her ownership claim and came forward as the beneficial owner of

a mortgage to Kelley, Glover & Vale, Inc., Trustee, that expressly recited it was junior to an earlier mortgage.

As such junior mortgage holder, she unsuccessfully contested the claim of the bondholders under the senior mortgage. She again appealed contending invalidity in the first mortgage obligations but agreeing that V–I–D's assets were insufficient to pay even the first mortgage. The allowance of the first mortgage claim was affirmed.

In re V–I–D, Inc., 198 F. (2) 392, cert. den. 344 U. S. 914.

The first mortgage claims having been classified as Class 1 and the Glover claim having been subordinated as Class 2, and the assets concededly not equaling the Class 1 claim, the trial court then approved an Amended Reorganization Plan for first mortgage bondholders that expressly found a "no value" status to the Glover second mortgage.

Again she appealed, but did not take up the evidence. On this unassailed finding of "no value" to the Glover claim, the Court of Appeals dismissed the appeal because hers being a "no value" claim, she was not an "aggrieved party" and hence, had no status to appeal.

In the Matter of V–I–D, Inc., 226 F. (2) 113.

In this last appeal, the burden of her complaint was the question previously adjudged against her in 198 F. (2) 392, that the first mortgage bonds were invalid.

The Court of Appeals, confronted with a "no value" appellant dismissed the appeal and did not reach the question of whether this repeated offense of attempting again to re-litigate a finally adjudged issue compounded Glover's contumacy.

Along the way, there were certain unappealed decrees. Among them were:

1. An April 9, 1953, one adjudging V–I–D, Inc., insolvent. (R. 62.)

2. An April 9, 1953, one classifying creditors with the first mortgage bondholders being Class 1 and the Glover claim a subordinate Class 2. (R. 63.)

3. An April 22, 1953, one determining $76,307.63 as the value of all V–I–D, Inc. assets. (R. 65.)

4. A November 5, 1953, one denying Glover's petition to dismiss the proceeding, which petition was grounded on the same objections later made to the Amended Reorganization Plan. (R. 73-74.)

In addition, in Glover's "Statement on Appeal" (R. 4) she stated:

> "The Court has fixed the value of the debtor's assets at $50,000.00 and about $26,000.00 cash, admittedly less than the Class 1 bond issue."

In its last opinion, 226 F. (2) 113, the Court stated:

> "As already noted, there has been an adjudication that the debtor was and is insolvent, that the value of its assets is far less than the amount of the claims of the first class creditors (the bondholders), and that the claim of the second class creditors (the appellant here) is of no value. None of these findings is attacked by appellant on the instant appeals. More than that, it is conceded by appellant that the proceeding was properly instituted and that the court had jurisdiction."

(G)

Argument and Grounds of Resistance to Certiorari Being Granted

The Court of Appeals did not err in holding petitioner had no appealable interest because:

1.

Only an "aggrieved party" may appeal.
11 U. S. C. A. 48.

Since petitioner was adjudged a "no value" party (and never appealed from that finding) it could not be "aggrieved" because that term is limited to those

> "whose property may be diminished, his burdens increased, or his rights detrimentally affected by the order sought to be reversed."
>
> In re Mich.-Ohio Bldg. Corp., 117 F. (2) 191.

This merely applies to reorganization matters the general rule in appellate matters that error, if any, can be raised only where it is prejudicial to the appealing party himself.

2.

Controlling precedent of this tribunal mandated the decision below that a "no value" party in a corporate reorganization proceeding is without standing to appeal.

That exists because of this Court's decision that in such a case a "no value" claimant is properly denied leave to appeal, the holding being:

> "Petitioners insist that their consent to the plan of reorganization was necessary or that their claims should have been accorded 'adequate protection.' But

the adequate protection to which the statute refers is 'for the realization of the value of the interests, claims or liens affected. Here the controlling finding is not only that there was no equity in the property above the first mortgage but that petitioners' claims were appraised by the court as having "no value." There was no value to be protected.' "

In the matter of 620 Church Street Corp. et al., 299 U. S. 24.

3.

All this, petitioner seeks to avoid by attempting to contend the Class 1 bondholders' claim is invalid.

Such a claim is patently sham because In re V–I–D, Inc., 198 F. (2) 392, cert. den., 344 U. S. 914, solemnly adjudged the exact contrary in this very case between these very parties.

4.

Petitioner would obviate, 189 F. (2) 392 by saying "this 'allowance' was only provisional."

Neither authority nor reason is cited for that assertion. There is nothing provisional about that final judgment in its determination that henceforth in this proceeding the Class 1 bondholders' claims were valid.

5.

All 226 F. (2) 113 decides is that after 198 F. (2) 392 decided Class 1 validity and amount and after an unassailed finding that petitioner has a "no value" claim, it cannot further interfere in carrying out of a plan for the only "value" claimants there are.

No Court could have done less because, constitutionally, until *all* prior claims are protected in full, no plan can embrace lesser ones.

Consolidated Rock Products Co. v. DuBois, 312 U. S. 510, 45 A. B. R. (N. S.) 79, 85 L. Ed. 982;
Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 41 A. B. R. (N. S.) 110;
Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 318 U. S. 532, 52 A. B. R. (N. S.) 526, 87 L. Ed. 959.

6.

Petitioner cites no precedent that it has an appealable interest. None exists.

Petitioner meets none of Rule 19's requirements as to considerations applying to review on certiorari. It claims no conflict among the Courts of Appeal, or conflict with state law or a decision of an important question of Federal law which has not, but should be settled by this Court, or any conflict with any decision of this Court.

While its statement of grounds for invoking this Court's jurisdiction directs attention to "this Court's power of supervision" she points out no departure from any accepted or usual course of judicial proceedings.

7.

On page 6 of the certiorari petition, it is conceded that if petitioner's last appeal (226 F. (2) 113), was sham, dismissal of the appeal below was proper.

Petitioner then proceeds on pages 7-11 of the certiorari petition to give three asserted reasons why its appeal was not sham.

Even cursory consideration of those claims demonstrates its grounds were vacuous.

For instance, on pages 7 and 8 of its petition it says the Amended Plan "on its face is a perversion of the Chapter 10 machinery for favoring one of two liens. . . ."

This claim is unfounded.

An orderly liquidation meets all requirements of the Act,

Matter of Lorraine Castle Apartments Bldg. Corp., Inc. (CA 7th, 1945), 149 F. (2) 55, cert. den., 66 Supreme Court 35;

Countrylife Apartments, Inc. v. Buckley (CA 2nd), 145 F. (2) 935;

6 Coll. (14th Ed.), Sec. 10.02, page 3451

and where, as here, the first mortgage exceeds the value of the property, the Court can, by reorganization, transfer the property to the first mortgage bondholders.

Matter of Reading Hotel Corp. v. Protective Committee, etc., 15 F. Supp. 527, Affirmed 89 F. (2) 53.

In fact, since the assets did not equal the first mortgage claims, any attempt to provide participation by subsequent "no value" ones, could not be other than an unconstitutional confiscation of prior claims.

Consolidated Rock Products Co. v. DuBois, 312 U. S. 510;

Case v. Los Angeles Lumber Products Co., 308 U. S. 106.

Petitioner seems to contend that because the first mortgage claims are in rem against V–I–D's property rather than in personam, the reorganization statute does not ap-

ply. That contention is wholly untenable because each under the statute is a "claim."

11 U. S. C. A. 506(1);
Herbert V. Apartments Corp. v. Mortgage, etc., Corp. 98 F. (2) 662, cert den., 305 U. S. 640.

Next, on pages 8 and 9 of its petition, petitioner claims that the Amended Plan fails because of a claimed lack of disinterest by the then counsel for the Trustee.

This assertion is unfounded in fact. If, however, it had a fact basis, then whatever its consequences to that attorney, it could never become a vehicle to convert "no value" Class 2 claims into priority over Class 1 claims.

Finally, petitioner attacks the Amended Plan on pages 9-11 of its petition by asserting that some Class 1 claimants may not claim their rights and that anything thus unclaimed should go to it.

This also is sham because until all Class 1 claims are paid in full, any such unclaimed funds would necessarily have to be applied on the unpaid balance of Class 1 claims.

The statute, 11 U. S. C. A. 605, requires that any distribution of unclaimed assets is governed by the statute and mandates that the plan be fair, equitable and feasible, 11 U. S. C. A. Section 574 and 621. Any plan that permitted participation by "no value" claimants without first having paid prior claimants in full cannot meet those requirements.

Consolidated Rock Products Co. v. DuBois, 312 U. S. 510, 45 A. B. R. (N. S.) 79, 85 L. Ed. 982;
Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 41 A. B. R. (N. S.) 110;
Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 318 U. S. 532, 52 A. B. R. (N. S.) 526, 87 L. Ed. 959.

Petitioner being a "no value" claimant, what the plan does or does not do with property or money in which petitioner has no interest is obviously of no concern to it.

8.

In any event, a "no value claim" must have leave of court to appeal because all claims under $500.00 are subject to this requirement.

11 U. S. C. A. 47(a) or 48.

No such leave was here sought or obtained.

Hence, the unassailed no value finding as to petitioner's claim prevented any appeal, where, as here, leave to appeal was never sought.

In any event there was a fatal defect of parties—appellee in the Court of Appeals as neither V–I–D, Inc., nor any first mortgage bondholders except the Kramers were joined.

This collides with the rule that all parties interested are necessary parties to an appeal

Cyc. Fed. Proc. (3rd Ed.), Vol. 13, p. 314, Sec. 58.22 and notes

and required a dismissal.

Respectfully submitted,

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As Attorney for McM. Coffing, Trustee, Respondent,

JOHN W. LYDDICK,
504 Broadway,
Gary, Indiana,
As Attorney for Remaining Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1955.

No. 609

IN THE MATTER OF V-I-D, INC.,

Debtor.

KELLEY, GLOVER & VALE, INC., Trustee,

Appellant-Petitioner,

vs.

Mc M. COFFING, Trustee,
PETER L. EVANS, Successor Indenture-Trustee,
CHARLES J. KRAMER and
HELEN E. KRAMER, Indenture Bondholders,

Appellees-Respondents.

Petition for Rehearing of Petition for Writ of Certiorari

to the United States Court of Appeals for the Seventh Circuit.

(Opinion and Statutes Appended)

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SUMMARY OF REASONS FOR REHEARING.

I.

Petitioner has an absolute right of appeal under the Chandler Act of 1938, as construed by the Supreme Court 3

II.

Apart from injustice to Petitioner, the opinion below places a restrictive, confused construction on the appeal sections of the Chandler Act and violates the Supreme Court precedents, because:

(a) It totally ignores these sections, which *enlarged* and clarified the right of appeal in 1938.

(b) It predicates its decision on an obselete case (*In the Matter of* 620 *Church St. Bldg. Corpn.*, 229 U.S. 24, 57 S. Ct. 88) which was decided in 1936, two years before the Chandler Act, under Section 77B requiring "leave" of the Court of Appeals before appealing.

PAGE

(c) It imports into bankruptcy appeals, a confused group of doctrines from the general law of Appeal and Error, about "appealable interest" "interest in the subject matter, etc." These doctrines have no application here.

III.

The public interest in correcting the above misconstruction and confusion of these remedial sections governing appeals from Chapter X and Bankruptcy matters, warrants the summary use of certiorari to correct this refusal of jurisdictions. 5

CASES AND STATUTES

Albin v. Cowing Pressure Relieving Joint Co. (1942), 307 U.S. 211, 212, 63 S. Ct. 170, 171 3

Young v. Higbee Co. (1945) 324 U.S. 204, 209-210, 65, S. 594, 597 4

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Luther & Moore Lumber Co. v. Knight (1910) 217 U.S. 257, 30 S. Ct. 505, 509-510 6

Parissi v. Telechron Inc. (1955) 349 U.S. 46, 75 S. Ct. 577 6

Mitchell v. White Consolidated Inc. (1949) 336 U.S. 959 6

11 U. S. C. 47 3

11 U. S. C. 580 and 606 4

IN THE

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PETER L. EVANS, Successor Indenture-Trustee,
CHARLES J. KRAMER and
HELEN E. KRAMER, Indenture Bondholders,

Appellees-Respondents.

Petition for Rehearing of Petition for Writ of Certiorari

to the United States Court of Appeals for the Seventh Circuit.

(Opinion and Statutes Appended)

May it Please the Court:

Opinions Below.

The Court of Appeals' opinion is reported in:

In re V-I-D, Inc. (7 Cir. 1955) 226 F. 2d. 113

The opinion is printed in Appendix hereof, pp. 9-13.

Applicable statutes and precedents are printed in Appendix hereof, pp. 13-36.

Jurisdiction in the Court of Appeals.

In this Chapter X "corporate reorganization proceeding," Petitioner, as Trustee, holds the "second" mortgage on the Debtor's property. The District Court confirmed a so-called "Plan of Reorganization" which destroys the corporation, destroys Petitioner's "second" mortgage, and hands the mortgaged property over to the "first" mortgage bondholders. (R. 78). Petitioner appealed from the order confirming this "Plan." (R. 154).

It is important to note the **unusual nature of the questions appealed,** as shown by the Statement of Points on Appeal (R. 118, 156; Appendix 34, *infra*), namely:

(1) The "Plan," on its face is *an illegal device,* outside the proper scope of Chapter X, *an abuse of the Chapter X judicial machinery,* for the *illegal purpose of circumventing Indiana law,* (under which the "first" mortgage would be *void* and Petitioner's mortgage would be a first, *full-value* lien).

(2) It appears on the face of the record that the reorganization Trustee's counsel who prepared the Plan *were also counsel* for "first" mortgage class 1 bondholders,—hence, "this Plan comes from a biased and incompetent source, contrary to *Sections* 156, 157 *and* 169 of the Act (28 U.S.C. 556, 557, 569)."

(3) If the Plan be otherwise valid, it unlawfully cheats Petitioner out of about $25,000.00 of new securities which will be forfeited by "unknown" Class

1 bondholders at the end of five years, and which under *Sections* 204 *and* 205 (11 U.S.C. 604, 605) should then revert to the Debtor, and thence to Petitioner.

It is not denied that Petitioner's appeal was in proper procedure and in proper time (R. 112, 117, 154). (The prior orders determining the Debtor "insolvent," etc., referred to in the opinion, were all made *before* the Plan was proposed and filed. (R. 62-65, 77).

Appeal Dismissed—Ground.

The Court of Appeals sustained a motion of the Appellees-Respondents to dismiss the appeal "on the ground that the Appellant-Petitioner had *"no interest* in the *subject matter"* and, therefore, this court was *without jurisdiction."* The opinion concludes "appellant had *no appealable interest."* (Appendix pp. 11, 12, *infra*).

Jurisdiction of Supreme Court.

Petition for Writ of Certiorari, timely filed under 28 U.S.C. 1254(1), was entertained on the merits by this Court and denied on February 27, 1956. This Petition is filed within the extended time allowed.

Reason Why Rehearing Should be Granted.

I.

This Petitioner, a "second" mortgage trustee creditor appealing from the District Court's confirmation of a Plan, **had an absolute statutory right of appeal to the Court of Appeals**, under the Chandler Act of 1938.

11 U. S. C. 47, quoted in Appendix p. 15 *infra.*

Albin v. Cowing Pressure Relieving Joint Co. (1942), 307 U. S. 211, 212, 63 S. Ct. 170, 171, quoted Appendix p. 17 *infra.*

Petitioner also had an **absolute right** to be heard on "**all matters**" in this Chapter X proceeding both in the District Court **and the Court of Appeals** under other sections, 180 and 206, of the Chandler Act of 1938, as construed by the Supreme Court.

11 U. S. C. 580 and 606, quoted in Appendix, p. 19, *infra.*

Young v. Higbee Co. (1945) 324 U.S. 204, 209-210, 65, S. 594, 597, quoted in Appendix 18-19; *infra.*

II.

Apart from the injustice to Petitioner in denying his right of appeal—

This Court of Appeals' decision places a restrictive, confused construction on the above sections of the Chandler Act and violates the above Supreme Court precedents, because:

(a) It totally ignoring all the above Sections, which *enlarged* and clarified the right of appeal in 1938.

(b) It predicates its decision upon an *obsolete* Supreme Court case decided in 1936, two years *before* the Chandler Act, under *Section* 77(b) when "leave" of a Court of appeals was required to appeal most matters "in proceedings in bankruptcy." This restriction was swept away by the 1938 Chandler Act. The obsolete case is:

In the Matter of 620 Church St. Bldg. Corpn. (1936), 229 U.S. 24, 57 S. Ct. 88, 89, quoted in Appendix, pp. 17-18, infra.

(c) It imports into bankruptcy appeals a confused doctrine, or combination of doctrines, from the general law of Appeal and Error, on the subject of "appealable interest" and "interest in the subject matter" (Appendix, pp.

11-12, *infra.*) These doctrines have no application to this appeal because:

(1) The "appealable interest" of indenture trustees, creditors, stockholders, etc. is *conferred* by the above *statutes* without qualification. This opinion silently *engrafts* those obscure doctrines on there statutes.

(2) Petitioner had a vital interest in the subject matter, *not* on the basis of the "no value" *classification* given Petitioner's "second" mortgage in this Plan, but on the basis that Petitioner had *a legitimate interest* which he asserted in his objections in the District Court (R. 100, 148, 151) and Statement of Points on Appeal (R. 118, 156) *invoking the jurisdiction* of *both* courts *to do their statutory duty of refusing confirmation* to this Plan. This would open the door to *probable dismissal of this unlawful and abortive Chapter X proceeding.*

Note: Distinction of above points versus point in Petition for Writ of Certiorari.

It is only this last sub-point (2) which was substantially presented in the Petition for Writ of Certiorari. Though the petition, at page 2, invoked this Court's power of supervision to enforce his right of appeal in the court below, it predicated this upon the remaining pages 3-17 wherein it sought to demonstrate that it *had* an "appealable interest" within the *fallacious requirement* set up in the opinion.

III.

Petitioner believe that this Court should and does grant certiorari (usually in summary manner) more readily **to cure refusals of jurisdiction** by Courts of Appeals:

Anderson v. Atherton (1937) 302 U. S. 643, 58 S. Ct. 53, quoted in Appendix, p. 13, infra.

Luther & Moore Lumber Co. v. Knight (1910) 217 U.S. 257, 30 S. Ct. 505, 509-510, quoted in Appendix, p. 13, infra.

Frequently, these summary writs of certiorari are granted to preserve the *individual* rights of the petitioner to obtain a review in the Court of Appeals, even in the absence of the stronger reasons above stated which are present here. In addition to *Mitchell* v. *White Consolidated Inc.* (1949) 336 U.S. 959, cited in the Petition for Certiorari, there is the following more recent case where the Court of Appeals dismissed for failure to pay the $5 filing fee when the notice of appeal was filed. Certiorari was granted and "case transferred to the summary calendar" *Parissi* v. *Telechron Inc.* (1954) 348 U.S. 860, followed by a Per Curiam memorandum opinion *reversing* the Court of Appeals dismissal:

Parissi v. Telechron Inc. (1955) 349 U.S. 46, 75 S. Ct. 577.

ARGUMENT.

As shown in the note preceding III, *supra*, we believe that this presentation of the above statutes and Supreme Court decisions construing them as *giving* an *absolute right of appeal* to this Petitioner and to the large classes of others like him in Chapter X proceedings, clearly merits this Court's consideration of this petition as presenting "other substantial grounds available to petitioner although not previously presented" under *Rule* 58(2), (See certificate of counsel at the foot of this petition).

Appended hereto as a matter of convenience, is the Court of Appeals' opinion, followed by the text of the statutes and quotations from the Supreme Court decisions above cited (Appendix, pp. 13-20). The Appendix also quotes excerpts from other cases less directly bearing upon the immediate question but which we believe may be helpful in demonstrating that petitioner has a *clear* and *important* right of appeal which involves a *strong public interest.*

We have endeavored to group all these statutes and cases and to indicate their general subject matter and application by the headings.

Relative to the absolute right of appeal above mentioned under I: The statutes and decisions place no requirement on the appellant to demonstrate a *money value* of his rights in order to appeal. They repel this inference by *granting* the right *generally* to *all* the specified *classes* without qualification.

It must also be apparent that in many, or most, Chapter X proceedings the rights asserted by junior creditors, and more particularly, the rights of stockholders would have no money value. This matter of lack of *money value* was mentioned in the obsolete *In re*: 620 *Church Street Building Corporation* (1936) 299 U.S. 24, 26, as reason for holding

the Court of Appeals *had not abused its discretion* in refusing *leave* to appeal. But the Supreme Court had nevertheless granted its extraordinary writ of certiorari under the "All Writs Statute" to *ascertain* whether the Court of Appeals had abused its discretion in refusing to leave. The junior mortgagee's need for relief, and the public policy of protecting his right to review, were much less strong than in the present case, because there the petitioner made no assertion of the two basic illegalities which our Statement of Points on Appeal raises. If that petitioner was entitled to this Court's protection under the "All Writs" section, we are more entitled to the summary remedy sought.

WHEREFORE, Petitioner respectfully prays a Rehearing of his Petition for Writ of Certiorari, that said writ may issue as prayed, and for all further just and proper relief in the premises.

JAY E. DARLINGTON
Attorney for Appellant-Petitioner

Certificate of Counsel.

Jay E. Darlington certifies: that the foregoing petition presents other substantial grounds available to Petitioner, although not previously presented in his Petition for Writ of Certiorari, as more fully set forth at the end of ground II, *supra,* that the Petition is restricted to the grounds above specified, to his best judgment and understanding; and that this Petition is presented in good faith and not for delay.

.....

JAY E. DARLINGTON

Appendix—Court of Appeals' Opinion

October 7, 1955.

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

MAJOR, *Circuit Judge.* These appeals are from orders entered in a proceeding for the reorganization of the debtor corporation under Chapter X of the Bankruptcy Act. No. 11194 is from an order of February 1, 1954, overruling appellants objections to approval of an amended plan, and No. 11265 is from an order of June 30, 1954, confirming the amended plan. Both appeals raise the same questions and they have been consolidated in this court.

The proceeding was commenced on June 24, 1939, by the voluntary petition of the debtor corporation. On August 28, 1939, an order was entered in which it was recited that the court was satisfied that the petition complied with Chapter X of the Bankruptcy Act and had been filed in good faith, and approved the same as properly filed. A trustee was duly appointed and, on October 11, 1939, qualified as such. On December 1, 1939, Marguerite S. Glover filed her intervention or reclamation petition claiming ownership to the real estate of the debtor, the same being its only asset, and praying for possession thereof and for a decree quieting her title therein. Since that time the reorganization proceeding has been stymied by the protracted litigation resorted to by Glover and her alter ego, Kelley, Glover & Vale, Inc., as trustee (objector and appellant in the instant case), as is evidenced by the fact that there have been three previous appeals to this court. *In re V-I-D, Inc., Debtor,* 158 F. 2d 964; *In re V-I-D, Inc.,* 177 F. 2d 234 and *In re V-I-D, Inc.,* 198 F. 2d 392. In the first

two cited cases Glover was the appellant, and in the last, as in the instant appeal, Kelley, Glover & Vale, Inc. was the appellant.

Without any attempt to review our previous decisions or the facts recited therein, we think it can be safely said that the essential controversy during this prolonged litigation was whether the bonded indebtedness of the corporation constituted a lien prior to a mortgage indebtedness secured by a mortgage on the real estate. See *In re V-I-D, Inc.*, 198 F. 2d 392, 394. The debtor had no assets other than its real estate and it has long ago been decided that its value was far less than the amount of its bonded indebtedness. As was stated in the case last cited, "The parties agree that the real estate here involved is not of sufficient value to satisfy either of these claims."

On April 9, 1953, the court entered an order classifying the creditors into two classes: Class 1, holders and owners of bonds secured by trust indenture, dated December 30, 1927, and Class 2, the beneficial owner and holder of judgment of foreclosure in favor of Kelley, Glover & Vale, Inc. On the same date, the court entered an order in which it was found, "That the fair value of the assets of this debtor is less than the aggregate debts under Classes 1 and 2, as specified in the order classifying creditors entered this date, and * * That V-I-D, Inc. is insolvent." Again, on August 5, 1953, the court found that the aggregate value of all property in the hands of the trustee was $76,307.63. No appeal was taken from any of these orders and they are not now subject to review. The Court, in its order of June 30, 1954 (one of the orders appealed from), found that Class 1 claims had been allowed in the amount of $373,638.75, reiterated its previous finding as to the total value of the debtor's assets and found that the Class 2 claim "is of no value."

On September 11, 1953, an amended plan of reorganization was submitted by the court appointed trustee. It is this plan which is now under attack, for reasons which we find difficult to comprehend. The strategy of the appellant, however, appears to rest upon the hope that a reversal will result in a dismissal of the proceeding with the rights of the parties relegated to the State courts, where litigation can be renewed and perhaps continued for another ten years.

Previously, this court denied a motion by appellees to dismiss the appeals on the ground that appellant had no interest in the subject matter and, therefore, this court was without jurisdiction. The motion to dismiss has been renewed on this hearing. We have reached the conclusion that we previously erred in denying the motion to dismiss and that the motion must now be granted. As already noted, there has been an adjudication that the debtor was and is insolvent, that the value of its assets is far less than the amount of the claims of the first class creditors (the bondholders), and that the claim of the second class creditors (the appellant here) is of no value. None of these findings is attacked by appellant on the instant appeals. More than that, it is conceded by appellant that the proceeding was properly instituted and that the court had jurisdiction.

This court, *In re Michigan-Ohio Bldg. Corporation,* 117 F. 2d 191, dismissed an appeal on our own motion because the appellants had no appealable interest. While that was a proceeding under Section 77 (b) of the Bankruptcy Act, we think that the reasoning is pertinent here. We said (page 193): "Speaking more specifically, a party has an appealable interest only when his property may be diminished, his burdens increased or his rights detrimentally

affected by the order sought to be reviewed." It has also been recognized that in a Chapter X proceeding a creditor must be adversely affected as a prerequisite to a right to appeal. *In re Keystone Realty Holding Co.*, 117 F. 2d 1003, 1005. In *In the Matter of 620 Church Street Building Corp. et al.*, 299 U. S. 24, the court considered the action of the Court of Appeals in denying leave to appeal from an order confirming a plan of reorganization under Section 77 (b). In discussing the issue the court made a statement which we think pertinent here (page 27): "Petitioners insist that their consent to the plan of reorganization was necessary or that their claims should have been accorded 'adequate protection.' But the adequate protection to which the statute refers is 'for the realization of the value of the interests, claims or liens' affected. Here the controlling finding is not only that there was no equity in the property above the first mortgage but that petitioners' claims were appraised by the court as having 'no value.' There was no value to be protected."

The essential attack upon the order confirming the amended plan is that the first class creditors take everything and appellant, as a second class creditor, takes nothing. This, however, would be the inevitable result in any plan which might be proposed. At any rate, we know of no theory by which a creditor with a preferred lien can be compelled to share its rights with a creditor which is junior. Moreover, the court had the authority under Section 636 of Chapter X to adjudicate the debtor a bankrupt and proceed to liquidate the estate. See *Magidson* v. *Duggan et al.*, 212 F. 2d 748, 760. Again, if that event had occurred, no part of the proceeds could have been realized by appellant as a junior creditor, all of which merely fortifies our conclusion that appellant had no appealable interest.

The appeals are, therefore, dismissed.

Supreme Court will give Remedy for Court of Appeals' Erroneous Refusal of Jurisdiction to Review a Question.

"The Court is of the opinion that the Circuit Court of Appeals was in error in ruling that, in the absence of a cross appeal, *the question* where common law liability for negligence would support the decree *was not before the court for review.* (Citing cases). The decree of the Circuit Court of Appeals is reversed and the cause is remanded to that court for *the determination of that question.*" (Our emphasis).

Anderson v. Atherton (1937) 302 U.S. 643, 58 S. Ct. 53

Supreme Court grants Certiorari to Protect "Day in Court."

"Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the circuit court of appeals was substantially to *deny* to the plaintiffs in error in that court, petitioners here, *their day in court;* in other words, was equivalent to *condemning them without affording them an opportunity to be heard.*

• • • As it is patent from the statement we have made that *the only ground* upon which the power to issue certiorari could have been exerted was the *failure of the court below to consider the case before it,* we think this record *presents an exception* to the general rule of procedure above referred to. In other words, in a case like this we think the judgment of the circuit court of appeals *must be reversed,* and the case be *remanded* to that court, to the end that *the duty* to *hear and decide it may be performed.*" (Our emphasis).

Lutcher & Moore Lumber Co. v. Knight (1910) 217 U.S. 257, 30 S. Ct. 505, 509-510

Mandamus formerly used to Compel lower Court to Exercise Jurisdiction of Appeal.

"Although the supreme court of Washington territory rendered judgment in this case for costs against Parker, the appellant, it *nevertheless dismissed his appeal for want of jurisdiction in that court to entertain it.* • • • The supreme court *refused to hear the cause and to decide it upon its merits, because it considered that the cause was not lawfully before the court;* that the parties were not in court for the purposes of an appeal. *This presents a case for the exercise of the jurisdiction of this court in* **mandamus** according to the principles and practice applicable thereto. That writ properly lies in cases *where the inferior court refuses to take jurisdiction where by law it ought so to do,* or where, having obtained jurisdiction in a cause, *it refuses to proceed* in the due exercise thereof; but it will not lie to correct alleged errors occurring in the exercise of its judicial discretion within its jurisdiction. • • • In the present case, the supreme court of Washington territory, on consideration, *decided that it could not legally exercise jurisdiction upon the appeal* of the petitioner Parker. The question for our determination is whether that decision was in conformity with law.

"• • • It follows that Parker's appeal had been duly taken and perfected, and the cause had been properly transferred from the district to the supreme court of the territory, and that the latter, having acquired jurisdiction thereof, *should have proceeded in the exercise of its jurisdiction to hear and determine the same upon its merits.*" (Our emphasis).

Ex. parte Parker (1887) 120 U.S. 737, 7 S. Ct. 767, 769-771

"The object of the writ in the present case is *to require the court to proceed* in a matter properly cognizable by it, but upon which, *from a mistaken view of the law as to its jurisdiction, it has refused to act.* * * * It follows that the writ of **mandamus** must issue as prayed, directing the supreme court of the territory to reinstate the appeal taken to it in the cases mentioned, and to proceed to the hearing thereof in the usual course of its business; and it is so ordered." (Our emphasis).

Ex. parte Parker (1889) 131 U.S. 221, 9 S. Ct. 708, 710

Enlarged Jurisdiction of Courts of Appeals and Supreme Court in Bankruptcy Matters.

Present Statute.

"§ 47. Jurisdiction of appellate courts.

(a) The United State **courts of appeals,** in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, **are invested with appellate jurisdiction** from the several courts of bankruptcy in their respective jurisdictions *in proceedings in bankruptcy,* either *interlocutory or final,* and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, *both* in matters of *law and in matters of fact*: Provided, however, that the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: And provided further, that when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

(b) Such appellate jurisdiction shall be **exercised by appeal** and in the **form and manner of an appeal.**

(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted. As amended May 27, 1926, c. 406, § 9, 44 Stat. 664; June 7, 1934, c. 426, 48 Stat. 926; **June 22, 1938, c. 575,** § 1, 52 Stat. 854; **June 25, 1948, c. 646,** § 32, 62 Stat. 991; July 7, 1952, c. 579, § 9, 66 Stat. 424." (Our emphasis).

11 U. S. C. 47

Former Statute.

"§ 47. Same; appellate jurisdiction. (a) The circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation, in chambers and during their respective terms are invested with *appellate jurisdiction* of *controversies arising in bankruptcy proceedings* from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

(b) The several circuit courts of appeals shall have *jurisdiction* in *equity,* either interlocutory or final, to *superintend and revise* in matter *of law* the *proceedings* of the several inferior courts of bankruptcy within their jurisdiction. **Such power** shall be exercised on due notice and **petition** by any party aggrieved. * * * (July 1, 1898, c. 541, § 24, 30 Stat. 553; Feb. 13, 1925, c. 229, §§ 1, 5, 13, 43 Stat. 936, 937, 941." (Our emphasis).

11 U. S. C. 47. (Old).

"Leave" Abolished—Absolute Right of Appeal.

"Sec. 24, sub. a, of the Chandler Act, 52 Stat. 854, **11 U. S. C. § 47**, 11 U. S. C. A. § 47, sub. a, gives the Circuit Courts of Appeals appellate *jurisdiction* from courts of bankruptcy 'in *proceedings in bankruptcy, either interlocutory or final*'. An order of the bankruptcy court vacating a restraining order against prosecution of a suit in a state court is, like a stay order itself, a *proceeding in bankruptcy.* * * * The amendments to § 24, sub. a, made by the Chandler Act **practically abolished the distinction** between appeals as of **right** and by **leave.** * * *". (Our emphasis).

Albin v. Cowing Pressure Relieving Joint Co., (1942) 317 U.S. 211, 212, 63 S. Ct. 170, 171; Reh. den. 317 U.S. 712, 63 S. Ct. 432

Obsolete "Leave" Case Followed in Court of Appeals Opinion.

"To review an order of the Circuit Court of Appeals for the Seventh Circuit **denying leave** to appeal from an order of the District Court *affirming* a plan of reorganization, the debtor and others bring certiorari.

* * * * * * *

"In this proceeding **under section 77B** of the Bankruptcy Act (11 U. S. C. A. § 207), the District Court confirmed a plan of reorganization. Petitioners asked the Circuit Court of Appeals to *allow* an appeal upon the ground that the plan was *unfair* and *inequitable* and deprived *them* of their property without due process of law in violation of the Fifth Amendment.

* * * * * * *

"*Although* the Circuit Court of Appeals *declined jurisdiction,* its action *may properly be reviewed* upon a writ of

certiorari under the general power conferred by Judicial Code, § 262, 28 U. S. C. § 377 (28 U. S. C. A. § 377). That provision contemplates the employment of this writ in instances not covered by section 240 of the Judicial Code (28 U. S. C. § 347) (28 U. S. C. A. § 347), and affords *ample authority* for using the writ as an auxiliary process and as a means 'of giving full force and effect to existing appellate authority and of *furthering justice* in other kindred ways.' *United States* v. *Beatty,* 232 U. S. 463, 467, 34 S. Ct. 392, 394, 58 L. Ed. 686;

* * * * * * *

"Petitioners are the debtor, the holders of the *second and third mortgages,* and *stockholders.*

* * * * * * *

"Petitioners *insist* that their *consent to the plan* of reorganization *was necessary* or that *their claims* should have been accorded '*adequate* protection.'

* * * * * * *

"The Circuit Court of Appeals *did not abuse its discretion* in declining to *allow* an appeal." (Our emphasis).

In re: 620 *Church Street Bldg. Corporation* **(1936)** 299 U. S. 24, 26; 57 S. Ct. 88, 89

Note: Above case was erroneously followed in Court of Appeal's opinion as authority for its refusal of jurisdiction (pages 9-12, *supra*).

Absolute Right of Appeal under Chapter X.

"Potts and Boag (preferred stockholders) appealed under **Sec. 206** of the Chandler Act, which, **contrary to the general bankruptcy procedure, grants any stockholder or creditor the right to be heard on all matters** relating to

corporate reorganizations. Courts have liberally construed this language **as authorizing appeals.**" (Our emphasis).

Young v. Higbee Co., (1945) 324 U.S. 204, 209-210, 65 S. Ct. 594, 597, 89 L. Ed. 890

"**As creditors,** appellants' **standing to appeal** is derived from **§ 206 of the Act,** 11 U. S. C. A. § 606, which provides that:

> 'The debtor, the *indenture trustees,* and *any creditor* or stockholder of the debtor shall have the *right* to be heard on all matters arising in a proceeding under this chapter.'

The right to be heard under this section includes the right to appeal. *Rogers* v. *Consolidated Rock Products Co.,* 9 Cir., 1940, 114 F. 2d 108; *In re*: *Keystone Realty Holding Co.,* 3 Cir. 1942, 125 F. 2d 542; *In re*: *South State Street Bldg. Corp.,* 7 Cir., 1943, 140 F. 2d 363; *Horwitz* v. *Kaplan,* 1 Cir., 1951, 193 F. 2d 64." (Our emphasis).

Gleeson v. Carr (9 Cir. 1955) 219 F. 2d 64, 67

(§ 206) "Persons entitled to be heard.—The debtor; the indenture trustee, *and any creditor* or *stockholder* of the debtor *shall* have the *right to be heard* on *all* matters *arising in* a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees." (June 22, 1938, c. 575, § 1, 52 Stat. 894). (Our emphasis).

11 U. S. C. 606

"In substituting Chapter X for Section 77B Congress clearly intended to *broaden the rights of creditors* to participate in corporate reorganization proceedings. Whereas subsection c, of Section 77B had, as we have seen, restricted their participation as of *right* to but two phases of the

proceeding, section 206 of Chapter X, 11 U. S. C. A. § 606, conferred upon them 'the *right to be heard* on *all matters* arising in a proceeding under this chapter.' The intent thus disclosed by the statutory provisions is confirmed by the legislative history of the Chandler Act, which substituted Chapter X for Section 77B. In its report upon Representative Chandler's bill which became the Act of June 22, 1938, c. 575, 52 Stat. 840, the Senate Committee on the Judiciary said 'Section 206 gives *any creditor* or stockholder, *any indenture trustee,* and the debtor, the *right* to be heard on *all* matters in the proceedings. Former restrictions on such right to be heard *are eliminated as being undesirable.*' Senate Report No. 1916, 75th Cong. 3rd Sess." (Our emphasis).

In re: Keystone Realty Holding Co., (3 Cir. 1941) 117 F. 2d 1003, 1005

"Upon Hinkey's *appeal* the first question is of **our jurisdiction.** Although notice was sent to him under § 171 of the hearing required by § 170 for any *approval* of the Plan, *he did not appear* and the *order* under § 174 was entered in *his default.* Were he *concluded* by it, it might be argued that he should not be allowed to appeal, since he had not availed himself of the opportunity which the law gave him. However, § 180 expressly provides that approval of a plan '*shall not affect* the right of * * * *a creditor,* indenture trustee, or stockholder to *object* to the *confirmation* of the plan.' It seems therefore an idle formality to require a creditor who failed to appear on the first hearing, but who *must be given notice* of the second, to wait until the plan comes up for confirmation in order to raise any objections, which are apparent on the face of the plan. *All creditors* have an *absolute right* to be heard on *all* matters (§ 206), and it is desirable that they should be

heard as soon as convenient. * * * Moreover, the *matter* in which the plan at bar is *challenged,* are—at least in one respect—such that the judge might, and perhaps should, have taken notice of them, *sua sponte.* For these reasons we hold that we have jurisdiction over Hinkey's appeal.

Dudley v. *Mealey,* (2 Cir. 1945) 147 2d. 268, 270, 272

"Section 206 of the Act provides that 'any creditor or stockholder of the debtor shall have the *right to be heard* on *all* matters arising *in* a proceeding under this chapter'; and the right to be heard, thus conferred, **includes the right to appeal.** *In re: Keystone Realty Holding Co.,* 3 Cir. 1941, 117 F. 2d 1003, 1005, 133 A. L. R. 1378; *Dana* v. *S. E. C.,* 2 Cir., 1942, 125 F. 2d 542

"* * * These appellants were afforded ample opportunity to qualify themselves to *vote* on the plan. *But though they failed* to participate at *that* stage of the proceedings, it was proper for the district court, as it did here, to admit them to participation at the hearing on *confirmation* of the plan, having satisfied itself of the authenticity of their claims to be beneficial holders of stockholder interests.

"This brings us to a discussion of the *merits* of the appeal." (Our emphasis).

Horowitz v. *Kaplan,* (1 Cir. 1951) 193 F. 2d 64, 66 Cert. den. 342 U. S. 946

Second Mortgage Holder has Right of Appeal from Illegal Plan, notwithstanding Lack of "Value" as determined for purpose of Reorganization.

"Finally, the appellants, (*second mortgage holders*) contend that the court erred in finding that two-thirds of the *first* mortgage bondholders had assented to the plan. *This*

is a question which the appellants *may* raise **despite their lack of any equity in the property.** By subdivision (f) (3) of section 77B (1) U. S. C. A. § 207 (f) (3) acceptance as provided in subdivision (e) (1), 11 U. S. C. A. § 207 (e) (1) is made a **condition precedent to confirmation** of the plan. In *Downtown Inv. Ass'n.* v. *Boston Metropolitan Bldgs.*, 81 F. (2d) 314, 321 (C.C.A. 1), it is said that that compliance with subdivision (e) (1) is necessary 'before the court has jurisdiction to confirm a plan.' Whether it is truly jurisdictional we need not decide. Even if it be only a condition precedent to lawful confirmation, an order which confirms a plan *without the requisite consents* may be questioned by a **second mortgagee,** for **he cannot be deprived of his remedy of foreclosure** merely by proof that the first mortgage indebtedness is *greater* than the value of the property. Unless the *statute* takes the remedy away, he may insist upon it. Section 77B does take it away, but *only on condition*; therefore **he may insist that the condition be fulfilled.** * * *'' (Our emphasis).

In re: Witherbee Court Corporation (2 Cir. 1937) 88 F. 2d 251, 254, cert. den. 301 U.S. 701, reh. den. 301 U.S. 715

(§ 259) Dismissal of reorganization proceedings; allowance of costs and expenses incurred; reinstatement of prior proceedings.—*Upon a dismissal* of a proceeding under this chapter (§§ 501 to 676 of this title), *such prior proceedings shall become reinstated,* and the judge shall allow the reasonable costs and expenses under this chapter, including the allowances provided for in article XIII of this chapter (§§ 641 to 650 of this title), and shall make appropriate provision for the retransfer of such property to the person or persons entitled thereto upon such terms as may be equitable for the protection of the obligations

incurred in the proceedings under this chapter by the trustee or debtor in possession, and for the payment of the costs and expenses of the proceedings." (June 22, 1938, c. 575, § 1, 52 Stat. 902). (Our emphasis).

11 U. S. C. 659

" 'An *appealable interest* exists when the judgment or decree so affects a party or privy to the record that he *would derive* a substantial benefit from its *modification or reversal.*' " (Our emphasis).

Federal Farm Mortgage Corporation v. *Ganser*, (1945) 145 Nebr. 589; 17 N.W. 2d 613, 615

Overriding of Appellant's Second Mortgage is Contingent Upon Retention of Debtor in Bankruptcy Court.

Dismissal for Lack of a Lawful Plan would Restore Appellant's Rights in the State Court Foreclosure.

"A purpose of bankruptcy is so to *administer* an estate as to bring about a ratable *distribution* of assets among the bankrupt's credits. *What* claims of creditors are *valid* and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed, is a question which, in the absence of *overruling* federal law, is to be determined by reference to *state law.*

• • • • • •

"In determining what claims are *allowable* and *how* a debtor's assets shall be *distributed,* a bankruptcy court does not apply the law of the state where it sits. • • • bankruptcy courts must *administer* and enforce the Bankruptcy *Act* as interpreted by this Court in accordance with

authority granted by Congress to determine how *and what claims* shall be allowed under equitable principles.

* * * * * *

"When and under what circumstances federal courts will *allow interest* on *claims* against debtors' estates *being administered* by them has long been decided by federal law." (Our emphasis).

Vanston Bondholders Protective Committee v. *Green,* (1946) 329 U. S. 156, 161, 162-163, 67 S. Ct. 237, 239-240

Prior Interlocutory Orders and Appeals on "Insolvency" of Debtor and "No Value" of Second Mortgage become Moot if no Lawful Plan is Confirmed.

"In November, 1934 the Miami Trust Company, an Arizona corporation, filed its petition under § 77B * * *

"In June 1937, some two and a half years later, *the debtor filed a plan* of reorganization which the District Court found *not properly proposed.* * * *

"A modified plan of reorganization was then filed, which came on for hearing on November 23, 1937. The court on that date announced its conclusion that the proposed *plan* as modified, *was not such* as should be *confirmed;* * * * The proceeding was ordered *dismissed.* * * *

"The trustee has also appealed from an order *allowing the claim* of appellee Gila County, Arizona. Since the whole proceeding has been disposed of, questions *relating to the allowance of this claim have become moot,* and that appeal is also dismissed." (Our emphasis).

Loomis v. *Gila County, Ariz.,* (9 Cir. 1939) 101 F. 2d 827, 828 Reh. den. 103 F. 2d 312 Cert. den. 307 U. S. 643

"Bankruptcy courts are 'courts of equity without terms,' and *the entire process* of reorganization *is open to re-examination* until the *closing* of the proceedings. *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 152, 63 S. Ct. 133, 138, 87 L. Ed. 146; *Indemnity Ins. Co. of North America* v. *Reisley*, 2 Cir., 153 F. 2d, 296, and cases cited. Should the matter become unduly delayed below, appellant may seek more speedy action or, if necessary, *the closing of the proceeding* from the District Court.

National City Bank of New York v. *O'Connell*, (2 Cir. 1946) 155 F. 2d 329, 332

"Appellant further contends that the bankruptcy court had no authority to abrogate the lease rental contract because it had formerly *approved* it and authorized its continuance at the request of the temporary trustee, who was formerly the state court receiver. There is no merit in this contention. *In aid of creditors* and even of the *debtor*, the bankruptcy court may *always alter its administrative decrees*, where as here, no intervening rights of innocent parties have been or are likely to be materially interfered with." (Our emphasis).

In re: Roger Williams Bldg. Corporation, (7 Cir. 1939) 99 F. 2d 212, 217 cert. den. 307 U. S. 635

Court of Appeals Opinion begs the Question.

"Appellee seeks to *dismiss* this appeal *because*, it is said appellant has *no interest* in the subject-matter and is not entitled to appeal. *Whether* it has such an interest is *the issue* in the case. It *claimed* such interest in the circuit court, and *assigns error* here on the finding of that court

that it has no such interest. The fact that this issue might be decided against it here does not warrant the dismissal of its appeal." (Our emphasis).

Department of Public Works etc. v. *Rockwell Cemetery Ass'n.*, (1924) 312 Ill. 232, 143 N.E. 875, 877

"A consideration of the questions raised by the motion to dismiss would *require the same examination of the evidence* offered as would a consideration of the appeal on its merits. Motions to dismiss appeals are not looked upon with favor." (Our emphasis).

Davis v. *F. W. Woolworth Co.*, (10 Cir. 1931) 54 F. 2d 366

Public Interest that Review of this Abuse of Chapter X should not be Suppressed by the Devise of Refusing Appellate Jurisdiction.

"* * * it was *its duty* to *dismiss* the proceeding *whenever* it appeared that a fair and equitable *plan was not feasible*, leaving the debtor to the alternative remedy of bankruptcy liquidation, see *Tennessee Publishing Co.* v. *American National Bank*, 299 U.S. 18, 22, 57 S. Ct. 85, 81 L. Ed. 13. And it has long been the practice of bankruptcy courts *to permit* creditors or others *not entitled* to file pleadings or otherwise contest the allegations of a petition *to move for the vacation of an adjudication or the dismissal of a petition* on grounds, whether strictly jurisdictional or not, *that the proceeding ought not to be allowed to proceed.*" (Our emphasis).

Securities and Exchange Commission v. United States Realty & Improvement Co. (1940), 310 U. S. 434, 457-458, 60 S. Ct. 1044, 1054.

"*Unless* the District Judge finds that the plan has these qualities, he need go no further. Unless he so finds, *he has no authority to proceed.* There is no occasion for the District Judge to consider the constitutional validity of the application of the clauses of subsection (b) (5) if the debtor's proposal is not found to be 'fair' and 'feasible.'" (Our emphasis).

Tennessee Pub. Co. v. *American Nat. Bank* (1936) 299 U.S. 18, 22-23; 57 S.Ct. 85, 87.

Liquidation Feature of 77B Omitted from Chapter X,— if No Value Plan, Court Must Proceed in Bankruptcy or Dismiss.

"It was suggested at the bar that, even if liquidation is all that can be hoped, this would be *better managed* by a single bankruptcy court than in several separate proceedings. The difficulty with the suggestion is that Congress did not intend to resort to Chapter X to be had for the mere purpose of liquidation. The scheme of the chapter precludes any such conclusion. The mandate of § 144 is clear that unless the judge is satisfied the petition was filed in good faith he must dismiss it. Under the predecessor of Chapter X,— § *77 B* of the Bankruptcy Act—the district judge was given authority, by subsection c(8), under certain circumstances, to '*direct* the estate to be *liquidated,* or direct the trustee or trustees to liquidate the estate * * *.' *In Chapter X, on the other hand,* § 236 (2) provides that if no plan is approved or accepted, or *if it is not consummated,* the judge may, after hearing all persons in interest, adjudge the debtor a *bankrupt or dismiss* the proceeding as he may decide is in the interest of creditors and stockholders. Thus the statute *does not contemplate a*

liquidation in a Chapter X proceeding but a liquidation in ordinary bankruptcy *or a dismissal outright.*" (Our emphasis).

Fidelity Assur. Ass'n v. *Sims* (1943) 318 U.S. 608, 621, 63 S. Ct. 807, 813.

"In fact, a court *takes jurisdiction* under section 77B of the Bankruptcy Act *only to effectuate* a reorganization. • • •

"In further support of the court's action it might be observed that proceedings under section 77B are never to be used as a substitute for sequestration proceedings, nor are they to be viewed as *nursing* receiverships. Proceedings under section 77B are for the *purpose* of *reorganization.* Generally speaking, success depends upon the *speed* with which these reorganizations can be undertaken and completed. If plans are not *promptly* submitted *the proceedings should be dismissed.*" (Our emphasis).

In re: Utilities Power & Light Corporation (7 Cir. 1937) 91 F. 2d, 598, 602 cert. den. 302 U.S. 742.

Long Evasion of State Court Condemned.

"It is argued that an accounting may be required in the Federal Court as effectively as in the State Court. No doubt this is true, but it does not dispel appellees' *motive* in *shifting jurisdictions* under the circumstances presented. Their conduct and the demonstrated purpose of coming into the Federal Court was a fraud, not only upon that *court,* but the *State Court* as well. *Harkin* v. *Brundage,* 276 U.S. 36, 56, 48 S. Ct. 268, 72 L. Ed. 457. *Whenever* want of good faith appears, *the debtor's petition should be dismissed. First National Bank* v. *Conway Road Estates Company,* 8 Cir., 94 F. 2d 736, 739.

"Appellees stress the finding of the Master 'that this property has been in *continuous litigation* in the State Courts for a period of approximately *fourteen years;* • • • East side accuses the other of responsibility for the delay and the numerous suits which have been had in the State Court. Who is responsible for the situation *is not for us to determine now,* but in any event, the situation in the State Court can not alone confer jurisdiction upon the Federal Court." (Our emphasis).

In re: Cook (7 Cir. 1939) 104 F. 2d 981, 985-986.

"Unfortunate Results" flowing from Perversion of Chapter X.

"The history of these reorganization proceedings, out of which so much litigation has arisen, has been stated in greater detail than is necessary to present the questions under review. This has been done in part for the purpose of illustrating the *unfortunate results* which flow from drawing into *reorganization* proceedings under Chapter X of the Bankruptcy Act corporations which should be liquidated, *and of unnecessarily interfering with proceedings in a state court* and with prior bankruptcy proceedings in other jurisdictions. See *Fidelity Assurance Association* v. *Sims,* 318 U.S. 608, 621, 63 S. Ct. 807, 87 L. Ed. 1032; *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.,* 317 U.S. 78, 63 S. Ct. 93, 87 L. Ed. 64; *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six Wilcox Building Corp.,* 302 U.S. 120, 133, 58 S. Ct. 125, 82 L. Ed. 147. If the reorganization of a debtor corporation is not feasible, the proceedings should be promptly terminated. *Tennessee Publishing Co.* v. *American National Bank,* 299 U.S. 18, 22, 57 S. Ct. 85, 81 L. Ed. 13; (citing C.C.A. cases).

"*Section* 636 of Title 11 U.S.C.A. furnishes the means for *terminating* reorganization proceedings of debtor corporations the reorganization of which is *not feasible. Sylvan Beach, Inc.* v. *Koch, supra,* at page 862 of 140 F. 2d. Nearly *five years* have passed since this Court decided the *Oglesby & Simpson Supply Co.* case, in which the Court said at page 907 of 174 F. 2d: '*Whether* those holding preferred claims might seek *liquidation* of the estate (of National) we are not called upon to decide.' While we are still not required to rule upon the question of terminating these reorganization proceedings, we have no hesitation in saying that the preferred creditors of National and any of the creditors of Christopher Engineering can and should seek the liquidation in bankruptcy of these estates *or* a *dismissal* of the reorganization proceedings. It is to be hoped that the reorganization court, of its own motion, will bring about a termination of the proceedings for the reorganization of the debtors." (Our emphasis).

Magidson v. Duggan (8 Cir. 1954), 212 F. 2d 748, 760; Cert. den. 348-883, Reh. den. 348-922.

"In the *Platt* case, *supra,* Judge Woodrough, for this court, said: 'There is *a duty in the courts* to see that provisions of the act are *not abused* and that its privileges are extended *only to those* who are within the *contemplation* of the act.' 87 F. 2d 437 at page 440." (Our emphasis.)

Milwaukee Postal Bldg. Corporation v. *McCann* (8 Cir. 1938), 95 F. 2d 948, 950.

"Where, as here, *the so-called plan* filed within the time limit set by the court is not merely a *defective* plan, *but is not a Chapter X plan at all,* we would be inclined to hold that, within the meaning of § 236, no plan has been proposed within the time fixed or extended by the judge, and therefore that *termination* of the chapter X proceedings

is *mandatory.* We need not rest our decision on this ground, however.

"The present 'plan' as drafted has not been, and could not be, approved by the judge as an acceptable plan under chapter X. Nor should the judge grant further time for the filing of an amended plan if there is no immediate prospect that the debtor could devise an acceptable plan of reorganization, especially since over a *year and a half* has elapsed since the debtor filed its petition under chapter X. In that case, the proceedings under chapter X should be *terminated.* See *Lincoln Alliance Bank & Trust Co.* v. *Dye,* 2 Cir., 1940, 115 F. 2d 234. Under §§ 141 and 146 of the Act, 52 Stat. 887, it is provided that the judge at the *outset* shall dismiss a petition by the debtor under chapter X if satisfied that 'it is *unreasonable to expect* that a plan of reorganization can be effected.' If the petition *has* been approved, *and it later becomes evident* to the judge that there is no reasonable prospect of effecting a plan of reorganization, it *then* becomes *his duty* to *terminate* the chapter X proceedings, pursuant to § 236, above quoted." (Our emphasis).

John Hancock Mut. Life Ins. Co. v. *Casey* (1 Cir. 1944), 141 F. 2d 104, 107; Cert. denied 323-713.

Perversion of Chapter X as a Device to Thwart Foreclosure Rights.

"Second" Mortgage Holder Entitled to Raise This Question.

"We therefore turn to an examination of the circumstances which *control the discretion* of the District Court

with respect to the right of the debtor to *enjoin the foreclosure sale* and the correlative right of the appellant to freedom from restraint. It has been the rule in equity receivership cases that the bill must be dismissed for want of equity if it is not filed in good faith as, for example, when its *purpose* is to *hinder or delay creditors.* * * *

"In a reorganization proceeding under section 77B good faith means more than honesty of purpose. It also requires that there be a reasonable possibility of *successful reorganization.* * * *

"*Whenever* want of good faith *appears* the debtors' petition should be *dismissed* even though a plan of reorganization has not been submitted. * * *

"Considering the act itself and all these decisions it is apparent that it is the *duty* of the District Court to bear in mind the *purpose* and *function* of 77B at *every step* of the proceedings; and *whenever* it appears that *rehabilitation* of the *debtor* is impracticable *or* that injunctive relief is not sought in good faith the court in the exercise of a sound discretion should refuse the debtor further aid in harassing lienholders. In this view the contention of the debtor that appellant *cannot raise the question* of good faith is *without merit,* since the good faith of the debtor is one of the *equities* which control the exercise of the court's discretion." (Our emphasis).

First Nat. Bank v. *Conway Road Estates Co.* (8 Cir. 1938), 94 F. 2d 736, 739, cert. den. 304 U.S. 578.

"When the order now on appeal was made, the proceeding was *fourteen months old,* and the debtor had not put forward any plan; indeed it does not now even intimate

that there ever will be any beyond selling the vessel. Such a showing does not justify further delay; moreover, we *can see no reason why the mortgagee should not be allowed to foreclose in due course,* if so advised, and *not* be confined to a sale *in the bankruptcy court.*" (Our emphasis).

Lincoln-Alliance Bank & Trust Co. (2 Cir. 1940), 115 F. 2d 234, 235.

Statutory Requirements of "Disinterested" Trustee's Counsel Violated

(§ 157) "Attorney to represent trustee; appointment; qualifications.—An *attorney* appointed to represent a *trustee* under this chapter (§§ 501 to 676 of this title) shall *also* be a *disinterested* person: Provided, however, That for any specified purposes *other* than to represent a trustee *in conducting the proceeding* under this chapter the trustee may, with the approval of the judge, employ an attorney who is not disinterested." (June 22, 1938, c. 575, § 1, 52 Stat. 888). (Our emphasis).

11 U.S.C. 557

(§ 158) " 'Interested persons' defined.—A person shall not be deemed disinterested, for the purposes of section 156 and section of this Act (§§ 556, 557 of this title), if—

(1) he is a *creditor* or stockholder of the debtor; *or*

• • •

(4) it appears that he has, by reason of any other direct or indirect relationship to, connection with, or interest in the debtor or such underwriter, *or for any reason an interest materially adverse* to the interests of *any class*

of creditors or stockholders." (June 22, 1938, c. 575, §1, 52 Stat. 888). (Our emphasis).

11 U. S. C. 558

(§ 169) "Trustees; preparation and filing of plan or report; hearing; objections.—Where a trustee has been appointed the judge shall fix a time within with the *trustee shall prepare and file* a plan, or a report of his *reasons* why a plan *cannot* be effected, and shall fix a subsequent time for a *hearing on such plan* or report and for the consideration of any *objections* which may be made or of such *amendments* or plans as may be proposed by the debtor or by any creditor or stockholder." (June 22, 1938, c. 575, § 1, 52 Stat. 890). (Our emphasis).

11 U.S.C. 569

The Points Raised by Appellant-Petitioner on this Appeal do not Seek a Larger Share in the Fruits of reorganization, but Urge Reversal of order confirming Plan, followed by Dismissal of Proceeding, as Improvident, Unlawful and Contrary to Chapter X.

STATEMENT OF POINTS ON APPEAL.

On its appeal from the order of February 1, 1954, denying its objections to the Trustee's amended and modified plan of re-organization, the class 2 creditor, Kelley, Glover and Vale, Incorporated, Trustee, will rely upon the same points stated in said objections, to-wit:

(1)

The amended and modified plan, on its face, is *not properly a plan of re-organization* within the *intent and purpose of Chapter* 10 but is merely a *device* for the purpose of

enabling class 1 creditor Kramer, holder of at least $100,000.00 out of $135,000.00 principal amount of the class 1 bonds, to hold title to the debtor's real estate (its sole asset) in suspense for five years and then acquire title thereto through the *device* of a (private) trustee's sale, *thereby circumventing the foreclosure machinery of the Indiana courts* and *circumventing the relative rights of the class* 1 *and class* 2 *lienholders* thereon *under the law of Indiana.*

Further, it is not a plan of re-organization but provides for destruction of the corporate entity. It does not fall within any valid exception to the basic doctrine that the distinguishing feature and purpose of a Chapter 10 proceeding is not liquidation but corporate re-organization.

(2)

It appears on the face of the record that this "amended and modified plan" has been *prepared,* proposed and *urged* upon the court by *Trustee's counsel,* the firm of Draper and Draper, which, as first disclosed to this Court on April 9, 1953, has *since* 1941 acted and *still acts as counsel for the holders of* $2500.00 *of class* 1 *bonds.* Because of this and other *disqualifications* of this firm to so act, appearing on the face of the record, *this plan comes from a biased and incompetent source,* contrary to Sections 156, 157 and 169 of the Act (U.S.C.A. 556, 557, 569) and should not be approved by the court under Section 174.

(3)

This amended plan contains the following *illegal* and illegitimate *provision,* namely:

Neither the class 1 creditors nor the class 2 creditor are creditors of the debtor corporation. Both are merely hold-

ers of liens on its real estate. As appears on the face of the amended plan, a large number of the class 1 bondholders, *an estimated* $25,000.00 out of the $135,000.00 issue, *are unknown and will forfeit* their undivided shares of the real estate (approximately 20% thereof) by failing to make themselves known to the private trustee within five years. In this situation, the amended *plan improperly takes these unclaimed shares* and divides them among the *known* class 1 bondholders, *as if* these bondholders were creditors of the *debtor* corporation and as if the corporation *owed* the bonds.

On the contrary, both by virtue of *Section* 205 of the Act (11 U.S.C.A. 605) and the *substantive law of Indiana,* these unclaimed shares of the unknown bondholders who are equitable tenants in common of the land and its cash proceeds under the amended plan, *must revert* at the end of the said five-year period *to the class* 2 *creditor* which holds a lien on said real estate junior only to the class 1 bondholders, and if more than sufficient to satisfy the class 2 lien, the residue would *revert* to the *debtor* corporation. The plan's provision for destruction of the corporate entity cannot deprive the class 2 creditor of this vested right. (Our emphasis.)

(R. 118-199)

Jay E. Darlington

Attorney for Objector-Appellant

Note: Appellant subsequently filed a written adoption of the above Points as its Points on Appeal from the order of June 30, 1954, confirming the Trustee's Amended Plan. (R. 158). No party objected to this procedure.